

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DEARBORN BIG BOY NO. 3, INC.

and

Case 7-CA-38575

KIMBERLY KIRBY, An Individual

John Ciaramitaro, Esq., for the General Counsel.
Geno D. Salomone, Esq. (Logan, Wycoff, Okun & Salomone, P.C.), of Riverview, Michigan, for
the Respondent.

DECISION

Statement of the Case

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me in Detroit, Michigan, on April 7, 1997, pursuant to charges filed on May 23, 1996, against Dearborn Big Boy No. 3, Inc. (the Respondent) by Kimberly Kirby. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Kirby because she engaged in protected concerted activities.

On August 7, 1996, upon the Respondent's request, it was granted an extension of time to August 26, 1996, for filing an answer. On August 30, 1996, the Respondent filed an answer to the complaint denying the commission of any unfair labor practices.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction — The Business of the Respondent

Dearborn Big Boy No. 3, Inc., a corporation with an office and place of business in Detroit, Michigan, is engaged in the operation of a restaurant. During the calendar year ending December 31, 1995, the Respondent, in conducting its business operations, derived gross revenues in excess of \$1 million and purchased and caused to be delivered to its Detroit, Michigan facility, directly from points located outside the State of Michigan, goods and supplies valued in excess of \$20,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Alleged Unfair Labor practice

A. Background

5 Kimberly Kirby began her employment as a waitress at the Respondent's restaurant in October 1993. Kirby normally worked the 7 a.m. to 2 p.m. shift 4 to 5 days per week. Kirby's immediate supervisors at all times material to this matter were Ali Baydoun, manager of the restaurant, and Donna Lamentola, head waitress and assistant manager.¹

10 Kirby worked with about six other waitresses and several other support staff, i.e., cooks, dishwashers, and hostesses. Eunice Rice and Dana DeLuco were waitresses employed at the Respondent's restaurant and worked with Kirby on the morning to afternoon shift. The Respondent discharged Kirby on May 17, 1976.

15 B. The May 16 Incident

On May 16, 1996, Kirby reported for work to begin her normal 7 a.m. to 2 p.m. shift. Later in the morning near the luncheon hour, Dana DeLuco and Kirby approached Rice and began a conversation with her which would lead to the unfair labor charges. According to Rice, 20 who testified at the hearing, while she was stocking the back section of the restaurant, DeLuco said "this is racial discrimination"; Kirby repeated this, adding, "this is a lawsuit."² Rice's response at first was to ask what the two were talking about and thereafter to state that she did not want to be involved in whatever it was. Thereupon, Kirby explained to Rice that "they" (the Respondent) did not hire Rice's daughter and that, essentially, Rice could file a suit alleging 25 racial discrimination.³ Rice countered that race discrimination was not involved in the Respondent's decision not to hire her daughter; however, she did not reveal to Kirby or DeLuco at the time why her daughter, Carolyn, was not hired.⁴ Both Kirby and DeLuco continued to

30 ¹ Actually, Baydoun was Kirby's manager for only about 1 year of the time Kirby was employed at the restaurant. Lamentola was responsible for the overall management of the restaurant when Baydoun was not available.

35 ² I have credited Rice regarding Kirby and DeLuco's conversation with her regarding the nonhiring of her daughter by the Respondent. I found Rice to be a wholly credible witness, forthright, consistent, and steadfast in her testimony even as to possible embarrassing matters. Moreover, Rice's version of events seemed more plausible and was corroborated by Lamentola, whom I also found generally to be very credible. I was not impressed with Kirby's version of her conversation with Rice. Notably, Kirby insisted that she did not use the term "racial discrimination" or words to that effect. I do not find this to be plausible, considering the 40 totality of the record. I note that on this point that the General Counsel, while somewhat cagey in his brief (see p. 2 of GC br.) regarding whether Kirby used the term, nonetheless, hinges his case on the theory that Kirby's efforts (along with DeLuco) were calculated to encourage Rice to remedy the Respondent's perceived racially discriminatory hiring practices and were, thus, protected. Thus, even the General Counsel evidently does not vouch for Kirby on this score. 45 However, this is not to say that I found Kirby to be totally unworthy of belief in other aspects of her testimony.

³ Rice is black. Kirby and DeLuco are white. Rice's daughter is presumably black.

⁴ At the hearing, Rice explained that her daughter had made application for employment at the restaurant in May 1996, but she was not hired by Baydoun because the young woman was then pregnant and under the legal age to work at an establishment which sold alcoholic beverages. The daughter, who had never worked for the restaurant before, was eventually

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press the matter, and Rice, attempting to end the confrontation, walked away from them to another part of the restaurant. Kirby and DeLuco followed Rice to the front waitress station where Rice continued to protest that she wanted nothing to do with a lawsuit. Kirby continued to tell her that she should sue the Respondent in regard to its not hiring her daughter.⁵

Rice also was concerned about the customers hearing the exchange and admonished Kirby and DeLuco who, nonetheless, persisted in repeating “that this is a lawsuit” (for racial discrimination) and that Rice should sue the Respondent. After about 15-20 minutes of harangue from both Kirby and DeLuco, Rice eventually went to head waitress Lamentola to complain. Rice testified that she was in a state of extreme upset and confusion about Kirby’s interest in her or her family’s affairs. According to Rice, Kirby had on several prior occasions given her such a hard time⁶ that she had sought Baydoun’s assistance to get Kirby to leave her alone. In any event, Rice, reduced to tears, complained to Lamentola about Kirby and DeLuco’s conduct. Lamentola and Rice conferred briefly about the matter in the bar area of the restaurant.⁷ Afterwards, Lamentola advised Rice to go back to her duties, but did not tell her what actions she (Lamentola) would take to resolve the matter. Rice had no further conversations (or incidents) with Kirby or DeLuco for the balance of their respective shifts. Rice did not discuss the matter further with Lamentola either.

Kirby testified about her part in the events of May 16. According to Kirby, she reported to work at 7 a.m. to begin her usual shift. At around 9 a.m.,⁸ she asked Rice how she felt about her daughter’s not being hired while the daughter of another waitress, Katherine Smittle, had been hired. Kirby testified that Rice’s daughter had come to the restaurant on a couple of prior occasions, seeking employment. Rice, according to Kirby, had told her (and others) that her daughter would be hired soon, but she obviously had not. Kirby testified that Rice had also previously told her (Kirby) that her daughter had not been hired because of their mother-daughter relationship. Thus, with Smittle’s daughter coming on board, Kirby decided to ask Rice how she felt about the situation.⁹ Rice told Kirby that her feelings were hurt, but she thought that no one had noticed; that it was wrong because other workers’ family members were being hired while hers were not. Kirby then told Rice that she should hire a (cheap) lawyer and that she could sue the Respondent.¹⁰ After this advice, Rice, DeLuco, and Kirby

hired by Baydoun in late November or December 1996. Neither Kirby nor DeLuco was aware of this information at the time.

⁵ Rice testified that “Kim said to me, that is a f-----g lawsuit. And the customers turned around and I said, ‘I still don’t want to have anything to do with it,’ and they just kept nagging about it, and I went to Donna and I wasn’t pleased about [it], I was upset.”

⁶ Rice did not elaborate on these prior incidents or problems making for the hard times given her by Kirby.

⁷ Rice said that her conversation with Lamentola took place at about 12:45–1 p.m. and lasted for about 10 minutes.

⁸ Kirby freely admitted that her conversation with Rice took place on the floor of the restaurant (as opposed to the employee break area) and during a nonbreak period.

⁹ According to Kirby, Smittle’s daughter was hired about a week or two before the May 16 conversation.

¹⁰ Kirby testified that while Smittle and her daughter were white, and Rice and her daughter were black, she did not mention to Rice for what (legal action) the Respondent could be sued. Kirby was in fact emphatic in her denial that she never used the term “racial discrimination” and claimed to have not even heard DeLuco say anything about racial discrimination in her conversation with Rice. Kirby admitted that on occasion, she used profanity in the workplace;

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separated and continued with their duties. At around 11 a.m., Kirby saw Rice and Lamentola walking out together near the banquet room; Rice was crying. After a time, Kirby saw Lamentola alone and asked what was wrong with Rice. Lamentola told Kirby that she and DeLuco had hurt Rice's feelings — nothing more was said. Kirby next had occasion to speak to Rice at the waitress aisle at around 11-11:30 a.m. while they were placing food on trays for service to the lunch customers. Kirby asked Rice how she had hurt her (Rice's) feelings. According to Kirby, Rice told her that Kirby had not hurt her feelings as much as had DeLuco,¹¹ who Rice felt, by keeping the matter in a stir, in fact was antagonizing her. Rice wanted the matter dropped. After this conversation, nothing more was said between them, and they all continued to work together. However, Kirby noted that the employees (Lamentola and other waitresses) were talking among themselves.¹² Kirby believed that they were probably talking about what she had said to Rice because near the end of her shift, she had separate conversations with DeLuco and Smittle. First, DeLuco approached her and protested that the other employees were upset with both her and Kirby because Rice had said that they had intentionally tried to upset her (Rice) and Rice was angry. Then, at around this time, Kirby had a conversation with Smittle who had approached her. Kirby explained to Smittle that she thought it was wrong for Smittle's daughter to be hired and not Rice's daughter, and how did Smittle feel about this. According to Kirby, Smittle told her not to worry about things because Rice really was angry with DeLuco, not her, and that Kirby should simply do her job and go home,¹³ which Kirby did.

Donna Lamentola was called by the Respondent as a witness and gave her account of the events of May 16. Lamentola recalled that around the lunch hour (11:30-12), Rice pulled her aside in a separate room, and complained to her about Kirby and DeLuco's upsetting her regarding manager Baydoun's not hiring her daughter. Rice, very upset and crying, wanted the two to stop bothering her about the matter because she knew that Baydoun had reasons for not hiring her daughter. However, Kirby and DeLuco were making it a racial issue; Kirby and DeLuco felt that Baydoun should have hired her daughter. To Lamentola, Rice's complaint centered on Kirby's and DeLuco's pestering her and repeatedly bringing up the nonhiring and insisting that she (Rice) should sue the Respondent. Rice merely wanted to be left alone but, as Lamentola testified, "the gossip just kept going and going and going." In reaction to Rice's complaints and upset, Lamentola instructed Kirby and DeLuco to be quiet and do their jobs to get through the luncheon hour; she tried to soothe Rice by asking her to pay no attention to Kirby and DeLuco and urged her to try to attend to her duties.¹⁴ Lamentola also decided to call Baydoun at home on his day off and advise him of the goings-on. This call was made after she conversed with Rice privately at around 12:15 or 12:20 p.m., but before talking to Kirby and DeLuco.

Lamentola advised Baydoun that she could not handle the pressure of the "gossip"¹⁵ going on between Kirby, Rice, and DeLuco. Lamentola was asked by the General Counsel on

however, she denied using any profane language such as "Kick their ass or sue their ass," in advising Rice to sue.

¹¹ According to Kirby, Rice did not refer to DeLuco by name, but referred to her as "your girlfriend."

¹² Kirby did not overhear the conversations in terms of the topic(s) being discussed.

¹³ Karen Smittle did not testify at the hearing.

¹⁴ Lamentola could not recall telling Kirby or DeLuco about what Rice had told her.

¹⁵ Lamentola repeatedly referred to the hiring issue between Rice, Kirby, and DeLuco as "gossip" or idle gossip, and sometimes "nonsense."

cross-examination what she remembered telling Baydoun on May 16 in this telephone conversation. She responded:

5 I said that Kim [Kirby] and Dana [DeLuco] are talking to Eunice [Rice] about not hiring her daughter. And it was upsetting Eunice because Eunice would like her daughter there [at the restaurant], but if Ali [Baydoun] doesn't want to hire her, there is a particular reason why he didn't want to hire her, and Eunice knew it, and it was nobody's business why he didn't want to hire her at that particular time.

10 Lamentola could not specifically recall whether she told Baydoun that Kirby had advised Rice to file a lawsuit against the Respondent. As a result of Lamentola's complaints of her inability to handle the pressure caused by the "gossip" between Kirby, Rice, and DeLuco, Lamentola was told by Baydoun to fire Kirby and send her home. Lamentola refused, telling Baydoun that she did not think the time was proper — she had customers to serve — and furthermore, she had never fired anyone before. After this conversation, Lamentola had no further contact with either
15 of the three waitresses who finished their respective shifts without further incident.

Ali Baydoun was called as a witness by the Respondent. Baydoun testified that he first learned of the May 16 incident involving Kirby through the telephone call from Lamentola.
20 Lamentola was very upset and complained that no one was doing her work, that customers were walking out, and the restaurant was in complete chaos. Lamentola told him that Kirby and DeLuco were involved and causing her (Lamentola) problems by harassing Rice to the point of tears and preventing Rice from working her tables.¹⁶ Baydoun testified that he told Lamentola, "[If] you have a problem with Kim, send her home. When I come in, I will take care of it."¹⁷
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C. May 17, 1996 — Kirby's discharge

Kirby testified that she reported for work on May 17, her next workday, and worked her normal 7 a.m. to 2 p.m. shift. Nothing was said to her by her supervisor until the end of her
30 shift, when she was approached by Lamentola who advised that Baydoun wished to see her. According to Kirby, Baydoun asked her what had happened on May 16. Kirby explained that basically, she had asked Rice how she "felt" about her daughter's not being hired. Baydoun then asked her why she had asked this, and then stated that it was none of Kirby's business whom he hired. Furthermore, Baydoun told her she had no right to ask about whom he hires or
35 does not hire. According to Kirby, Baydoun also stated that he understood she had told one of the girls that she should sue the Respondent for racial discrimination. Kirby emphatically denied saying this and insisted that all she had done was ask Rice how she felt. Baydoun also accused her of making disparaging remarks about Smittle's daughter and claimed that Kirby had called her a "thing." Kirby denied this also. Baydoun then asked her if she would be
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45 ¹⁶ The Respondent's counsel asked Baydoun whether Lamentola advised him as to what exactly Kirby had done. Baydoun responded vaguely, "Some kind of problems and that Eunice was in tears, and she [Kirby] was harassing Eunice and Eunice wasn't able to pick up her tables, and that type of things."

¹⁷ Baydoun steadfastly denied that he told Lamentola to fire Kirby on May 16. As proof, Baydoun testified that his policy, when he was absent, was to send the problematic employee home when incidents such as this arose, so that the problem could be eliminated and the employees could continue serving customers.

finishing out the weekend,¹⁸ which led Kirby to ask if she was being fired. Baydoun nodded affirmatively; in response, Kirby uttered expletives and walked out.¹⁹

Kirby returned to the restaurant a few days later (the next Monday) to pick up her termination letter, which she needed to obtain welfare assistance. Kirby then raised the matter of her discharge and questioned Baydoun's firing her, considering her length of employment, and his merely suspending DeLuco (who had been employed by the Respondent for only about 5 months) for a week. According to Kirby, Baydoun did not respond to this and she stated "what comes around goes around." Also, Baydoun told Kirby that he was not going to give her a termination letter. Kirby protested and told him that was because he had no justifiable reason to fire her. Baydoun's response was that it was her "attitude" which had caused her discharge.²⁰ According to Kirby, Baydoun then said that after she had her baby, to come back and that he and she could possibly talk about reemployment. Kirby testified that she has not worked for Respondent since May 17.²¹

Baydoun testified about the events of May 17. Baydoun reported for work and after seeing to a few routine matters, talked to Rice who had come in to see him about the previous day's incident.²² Baydoun testified that in this meeting, Rice was still upset and cried quite a lot while describing Kirby's involvement in the harassment and her frustration in dealing with it. In essence, Rice told Baydoun that the matter was instigated by Kirby's approaching her (Rice) and asking how she felt about his hiring Nicki Moote (Smittle's daughter) as opposed to Rice's daughter.²³

¹⁸ Kirby was then 7-1/2 months pregnant and required by the Respondent to obtain written clearance from her doctor to work without restriction every week.

¹⁹ Kirby testified that she was very upset at the time and said f--k you, and may have called Baydoun a f-----g asshole.

²⁰ Kirby conceded that during this conversation Baydoun had said he had talked to her about her "attitude" a few times (before), and that he had in fact counseled her about her attitude at times before the May incident.

²¹ Kirby was to deliver the first week of August 1996. However, after her baby was born, Kirby never approached Baydoun (the Respondent) about returning to work.

²² It is interesting to note at this juncture that Rice, in her testimony, did not mention having met on May 17 with Baydoun to discuss the May 16 incident. As will be seen, Rice did discuss with Baydoun other events occurring on May 17.

²³ Baydoun was somewhat hesitant, vague, and nonresponsive in relating what happened in this supposedly highly emotional meeting with Rice. For instance, the General Counsel asked Baydoun what Rice told him that Kirby had done. Baydoun responded in the following exchange.

Q. Well did she say what Kim Kirby had done?

A. Something, matter of fact, she said she told her I guess, Nicki was in that day.

Q. Nicki? That Nicki Moote.

A. The new girl that was hired. I guess the start of it is that Kim had gone up to her and told her how would you feel if Ali had hired that thing? Maybe she wasn't a very pretty waitress, or anything but she was a good server. Hired that thing over your daughter.

Q. Now, how did you know that?

A. Eunice told me.

Q. Eunice told you. And she told you that on the morning of the 17th?

A. The following day, because she was crying.

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However, before his conversation with Rice, Baydoun had discussed the matter with Lamentola.²⁴ In this conversation, Baydoun stated that Lamentola reiterated how rough the previous day had been, and how she did not want a repetition of the incident, and again described to Baydoun that service that day was not performed properly and that customers had walked out. This conversation, according to Baydoun, was basically similar to the telephone conversation of May 16.²⁵

Baydoun also met with Kirby in his office at the end of her shift. Essentially, Baydoun testified that he called Kirby in, told her her services were no longer needed, and discharged her. According to Baydoun, he had decided to fire Kirby on May 16, partly because of Kirby's involvement in the uproar at the restaurant and the ensuing disruption of service, and partly because of Kirby's involvement in past incidents for which he had disciplined her. Thus, in short, according to Baydoun, Kirby's involvement in the incident with Rice was the straw that broke the camel's back.²⁶

D. Kirby's Disciplinary History with the Respondent Prior to May 16

Baydoun recounted several incidents in which he was forced to counsel Kirby about her behavior, attitude, and language during the year he supervised her.²⁷

Approximately 3 weeks to a month before the May 16 incident, Kirby was involved in an incident with one of his cooks — Eddie. Baydoun explained that he reprimanded Kirby for having sworn at Eddie because, in her view, he had not prepared her customer's eggs properly.

Q. So she tells you that the day before that Kim had come to her, right?

A. Yes.

Q. And said what to her?

A. That she was hired, that thing, over your daughter. This was after a lot of tears, and . . .

Q. Did Rice tell you anything more that you can recall?

A. No.

Q. That is all you can recall Rice saying?

A. Yes.

Q. And so as of the end of your conversation with Rice, these are the only details you know about this harassment that had occurred the day before, is that right?

A. Yes.

²⁴ Actually, Baydoun was not sure if he talked to Lamentola before talking to Rice, but thought that he probably talked to Lamentola first.

²⁵ Lamentola basically corroborates Baydoun's version of their conversation. However, Lamentola also testified that Baydoun in this May 17 conversation asked her why she did not simply fire Kirby if she was so upset over the incident. Lamentola told him once more, in essence, that she could not fire someone when her customers were not being served or the restaurant was not functioning properly.

²⁶ Baydoun explained the different disciplinary treatment he accorded to DeLuco by saying that he only suspended her for a week because of the Rice incident because he had never had problems with her and she was a good server, and good servers were hard to find. Baydoun also claims that he put up with Kirby's problems partly because of the difficulty of finding good help.

²⁷ The Respondent does not have a disciplinary process that includes written warnings, or progressive stages.

Kirby's behavior was so abusive that the cook walked off the job and had to be persuaded by Baydoun to return to work. Afterwards, Baydoun counseled Kirby, advising her that her use of the "F" word, "asshole," and demanding action from other workers without saying "please" and "thank you" were causing him much disruption in service, and that he was losing cooks and servers because of her attitude. Baydoun also related an incident occurring about 8 months prior in which Kirby asked a customer to leave her area because he had overstayed and was causing her to lose money on the table. Baydoun received a letter from the Company regarding the incident because the customer complained. Baydoun counseled Kirby about this matter. Baydoun also testified regarding an incident which occurred a short time after the Eddie-the-cook matter, in which Kirby called one of the Respondent's supervisors (Linda (last name not given)) a stupid f--king bi-ch right to her face and within earshot of the customers in the bar area of the restaurant. In addition to these specific incidents, Baydoun testified that there were many other incidents, mainly relating to Kirby's interpersonal deficits, her problems in communicating in a courteous way with the other workers, especially the cooks with whom he estimated were 90 percent of her communication problems, but also with customers. Baydoun explained that he did not terminate Kirby because of these incidents because, he, as her manager, wanted to bring out the good in her. Baydoun felt that Kirby simply needed to be positively motivated so that she would be polite. Consequently, he had many talks with her, urging her to smile and be pleasant. Baydoun testified that he felt that the incidents he described did not warrant Kirby's discharge. Moreover, he did not like to fire people and had not fired anyone in his years with the Respondent. Baydoun also felt sorry for Kirby who was pregnant and emotional at the time she swore at supervisor Linda; moreover, he felt that Kirby needed her job. Thus, because of these reasons, he put up with Kirby. However, on May 16, with Lamentola's telephone call, he decided he was fed up with Kirby and decided to discharge her for, as he said, these series of events.²⁸

At the hearing, Kirby acknowledged in the main her part in the Eddie-the-cook incident and the overstaying customer matter; she also admitted that Baydoun had counseled her regarding her "attitude" in the past. Kirby also acknowledged having used profane language on the job during her tenure at the restaurant. However, Kirby denied ever cursing any of her supervisors, Linda in particular.

E. Kirby's Post-Discharge Conduct (May 17)

As stated, Kirby was fired by Baydoun in his office on the afternoon of May 17. According to Rice, while standing near the cashiers' station, she overheard parts of Kirby's conversation with Baydoun.²⁹ According to Rice, Kirby was upset, and in a loud voice was using the "F" word, perhaps two or three times to Baydoun. Rice testified that she thought at the time that Kirby was really "going off" on Baydoun. Rice could not say whether the cashier on duty or other customers standing near the cashier heard what she heard; however, the cashiers' station was less than a foot away from Baydoun's closed office door. Rice also testified that when Kirby emerged from the office, she proceeded to the back of the restaurant

²⁸ Baydoun testified that his own wife was pregnant during this time. In fact, on May 16, he had spent 2 days at the hospital dealing with his wife's protracted labor, and when he returned home, he was quite stressed and tired. Baydoun volunteered that if Kirby were not pregnant, he might have fired her for swearing at her supervisor.

²⁹ Rice testified that she did not tarry to listen to the whole conversation because she was busy cashing out a customer; also, Rice could not hear what Baydoun was saying at all; only Kirby's audible cursing came through the closed office door.

to pick up her belongings. As she was leaving, Kirby called her (Rice) a stupid, f--king bi-ch (s-f-b), adding that she (Kirby) was merely trying to help Rice. Rice then went to the front of the restaurant where Baydoun was now standing and protested to him Kirby's addressing her as she had. Baydoun told her not to respond. Rice refrained from remarking to Kirby. Kirby then came by the cash register and, in Lamentola's presence, again called her (Rice) a s-f-b. Kirby then departed.³⁰ Rice testified that customers were only about a half-foot away when Kirby first cursed her (at the computer), and, besides, Kirby's voice was raised as a result of her being upset. The second time Kirby cursed her at the front register, customers were only about 2 feet from Kirby who was still upset and speaking loudly as she left the restaurant.

Lamentola testified that on May 17, after she discussed the May 16 incident with Baydoun, he asked her to cover for Kirby and to direct her to his office. Lamentola did not stay for the closed door meeting and did not hear any conversation between Baydoun and Kirby. However, after the meeting, Lamentola saw that Kirby, leaving the office, was very upset, angry, and crying, and as Kirby punched out, used some profanity, saying f--k this place. Also, as Kirby was leaving the restaurant, she turned to Rice and, in a loud voice, called her a f--king bi-ch, and said that she (Kirby) was defending her (Rice).

Baydoun testified that after he had informed Kirby of her discharge, she immediately left his office, preparatory to leaving to leaving the premises. As Kirby walked to the rear of the restaurant, she cursed at him and Rice, using terms such as f--k you and stupid bi-ch. To Baydoun, Kirby was yelling these profanities within the dining area so that all could hear. Baydoun described the scene as hectic and "not nice."

Kirby admitted that when Baydoun nodded in the affirmative to her question whether she was being fired, she said out of anger, f--k and may have called him a f--king asshole. Kirby did not recall calling Rice a s-f-b, although she believed she may have conversed with Rice as she was leaving.

F. Discussion and Conclusions

Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. §158(a)(1). One of the rights guaranteed in Section 7 is the right to engage in concerted activities . . . for the purpose of mutual aid or protection. 29 U.S.C. §157. The Board has held that in order to find that activities are concerted, the employee activities must have been "engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984). Under the *Meyers* analysis, an 8(a)(1) violation will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected under the Act, and the adverse employment action at issue was motivated by the employee's protected activity. *Id.*

G. Contention of the Parties

The General Counsel, in essence, argues that Kirby (along with her coworker DeLuco) brought to the attention of another coworker Rice, her (their) perceptions that the Respondent had discriminated on racial grounds against a prospective employee, Rice's daughter; and that

³⁰ Rice could not recall whether Kirby mentioned that she had been fired before she left the restaurant.

DeLuco and Kirby, acting on that perception, advised Rice that she may have grounds to sue the Respondent. In fact, they encouraged her to do so to remedy what Kirby and DeLuco perceived as the Respondent's (racially) discriminatory hiring practices. The General Counsel further argues that Kirby's actions were protected concerted activity and that she was fired for engaging in that activity. The General Counsel asserts that the Respondent's proffered reasons for her terminating Kirby are mere pretexts, and that a violation of Section 8(a)(1) of the Act should be found.

The Respondent acknowledges that concerted efforts by employees to alleviate racially discriminatory hiring practices of their employer have been recognized by the Board as protected activity. However, first, because Kirby specifically denied mentioning racial discrimination to Rice, the Respondent contends that her comments to Rice that she may be entitled to or should sue the Respondent were not protected. The Respondent further asserts that because there was no prior history of racial discrimination on the Respondent's part even if racial discrimination was mentioned by Kirby, a finding of concerted action with regard to race relations cannot be found.³¹

The Respondent principally argues, however, that it had legitimate reasons to terminate Kirby and, moreover, Kirby's behavior prior to, during, and after the May 16 incident cost her the protections of the Act, irrespective of whether her initial conversations with Rice were protected. Specifically, the Respondent contends that Kirby's prior problems on the job with customers, fellow employees, and supervisors for which she was disciplined, and her harassing of Rice in and of themselves justify her discharge. Additionally, Kirby's upsetting the business of the restaurant during a peak time in front of the customers warrants the action taken by it. Finally, the Respondent points to Kirby's outrageous behavior and profane-laced speech directed at her supervisor and coworkers in front of the customers at her discharge as additional actions causing her to forfeit the protections of the Act.

H. *The Alleged Concerted Activity*

The Board has long recognized that concerted efforts by employees to alleviate racially discriminatory employment conditions are or can be protected activity, so long as the efforts in question do not interfere with other important labor law principles, such as the rule of exclusive representation. *Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986). In *Vought*, a white employee communicated to several black employees that another white employee was rumored to be in line for promotion over a black employee, and suggested that the black employee take the matter up with management at the next meeting. The Board concluded that the white employee's remarks constituted protected concerted activity. Kirby's and DeLuco's statements to Rice are similar or at least of the same genre and, in my view, were a matter of mutual concern. The statements appear to me to have been engaged in with the object of initiating or inducing or preparing for group action or had some relation to group action in the interest of the Respondent's employees. *Id.*

³¹ Respondent cites *Pioneer Natural Gas Co. v. Oil Chemical & Atomic Workers, AFL-CIO*, 253 NLRB 17 (1980), in support of this proposition. I have perused the decision and would conclude that this decision does not stand for the proposition as asserted. Additionally, my research has disclosed no other Board or other authority supportive of Respondent's argument; accordingly, I reject this argument.

Here, it is clear that *Kirby and DeLuco*,³² according to Rice, approached her and communicated their perceptions that a white employee's daughter had been hired and that Rice's daughter had not; and that the Respondent had discriminated against Rice's daughter on racial grounds. Kirby asked Rice how she (Rice) felt about this, but, more importantly, suggested that the filing of a suit was appropriate. Certainly, Kirby and DeLuco approached Rice in concert, and neither Kirby nor DeLuco suggested that *they* should take a file a suit for themselves. Rather, the clear thrust of their conversation and expressed concerns were for a fellow employee, Rice, and her daughter as a prospective employee at the Respondent's restaurant. In my view, the conversations had as their certain objective inducing a current employee and perhaps a prospective employee to take an action which was in the interest of all of the Respondent's employees.³³ That Kirby's (and DeLuco's) actions were or proved to be unwelcome and her perceptions about racial discrimination on the Respondent's part ill-founded, does not nullify their protected nature.³⁴

I. *Knowledge and Animus*

In my view, it can hardly be disputed that the Respondent did not know the content of Kirby and DeLuco's conversation with Rice, i.e., that the two had approached Rice and advised her specifically that Rice's daughter had not been hired and that another sister employee's daughter had been, and that Rice should file a racial discrimination lawsuit. First, clearly Rice told her immediate supervisor, Lamentola,³⁵ of the conversations and complained to her that Kirby and DeLuco were harassing her. Lamentola, describing Rice's complaint as "gossip," admitted that she understood from Rice that the nonhiring issue centered on alleged racial discrimination by Baydoun. Second, after conversing with and consoling Rice, Lamentola called Baydoun in a fit of exasperation and explained what was going on. It is not precisely clear, based on Lamentola's testimony, whether she explained explicitly that Kirby and DeLuco had accused Baydoun of racial discrimination and were advising Rice to bring suit. Lamentola testified that she could not recall mentioning a lawsuit.

While I find Lamentola to be generally a credible witness, I do not believe that she was totally forthright in her response. It is significant to me that Lamentola was in quite a state on May 16, and I find it hard to believe that she did not tell Baydoun that not only was there a major upset among the three waitresses regarding Baydoun's not hiring Rice's daughter, but that he had been accused by Kirby and DeLuco of acting out of racial impulses or motivations. Lamentola testified that Baydoun instructed her to fire Kirby and send her home. This was a

³² I have credited Rice's testimony regarding Kirby and DeLuco's conversation with her on May 16, and specifically that both Kirby and DeLuco raised the issue of racial discrimination in the nonhiring of Rice's daughter. I found that Rice was forthright, steadfast, and accurate in her testimony, and was thoroughly a credible witness.

³³ It can hardly be argued, given the history of race relations in this country, that alleviating racial discrimination is not of interest to all employees in the workplace, irrespective of race or ethnicity of the person bringing the charge.

³⁴ See *Honeywell, Inc.*, 250 NLRB 160 (1980), where a suspended employee made derogatory remarks about supervisors and their employer as part of his protest against his employer's allegedly racial discrimination promotion policy. The Board, nonetheless, found his actions protected.

³⁵ The Respondent has stipulated and agreed, and I find, that Donna Lamentola and Ali Baydoun were at all material times supervisors and/or agents of Respondent under Sec. 2(11) and (13) of the Act.

very strong and unusual reaction from a man who testified that because he disliked firing people and had never before fired any one, his general policy for problematic employees was to send them home for the day so that the restaurant could function smoothly and he would have time to investigate the cause of the problem. I believe that Lamentola's refusal to follow Baydoun's order was a direct reflection of the unusualness of this reaction. I would infer that Lamentola told Baydoun about the racial discrimination charge on May 16, and that he was angry, and perhaps disappointed over it because of his expressed sympathy for Kirby and his past tolerance of her problems. Be that as it may, the Respondent's knowledge of the racial discrimination charge was certainly evident on May 17 when Baydoun came to work and discussed the matter with Lamentola and, as he claims, Rice.

There is no record evidence tending to show that the Respondent, in general, harbored any animus toward employee concerted activity. The question here, nonetheless, is whether Kirby's discharge was motivated by what I have found to be her having engaged in protected concerted activity. Baydoun becomes the focus of the inquiry since, clearly, Lamentola did not want to fire Kirby and in fact refused to fire her. Baydoun testified basically that he had experienced a series of on-the-job problems with Kirby and that the May 16 incident was the last straw, that he was fed up with her. Baydoun insisted that when Lamentola told him of Kirby's upsetting and harassing of Rice, and the disruptive effect of her conduct on the business, he decided then that Kirby had to go. In short, according to the Respondent, Baydoun's discharge of Kirby was based on legitimate reasons — her past problems with customers, fellow employees, and supervisors; the May 16 incident with Rice was merely the last in a series of similar problems. While Baydoun generally came across as a sincere and sympathetic manager, and was generally credible, I do not credit his testimony regarding his motivation or the reasons he offered to justify Kirby's discharge. First, Lamentola credibly testified that Baydoun did not mention any other incidents when he instructed her to fire Kirby on May 16; thus, the only incident in question had to be related to Kirby's racial discrimination charges. Second, Baydoun testified that none of Kirby's prior offenses, either individually or cumulatively, warranted even a suspension, let alone discharge; rather, Baydoun elected to counsel her. Even if Baydoun acted out of sympathy or pity, he certainly let slide some fairly egregious conduct on Kirby's part with only the mildest of disciplines. Third, there is the matter of Baydoun's responses to questions in a meeting he supposedly had with Rice on May 17. As earlier noted, Rice, who was eminently possessed of good memory, did not mention meeting with Baydoun on that day to discuss preliminarily the previous day's incident with Baydoun. Rice testified that she only spoke to Baydoun on May 17 because of Kirby's profane remarks to her. Thus, in all likelihood, the meeting did not take place. Additionally, Baydoun's testimony regarding what Rice related to him in the so-called meeting was rather vague, nonresponsive, and sketchy; and considering the magnitude of the entire incident, Baydoun's recall was less than impressive. Baydoun was either mistaken or confused with regard to the meeting's occurrence in my view. But more important, he simply did not seem forthright, and his credibility suffered for it. Then there is the matter of the disparate punishment of Kirby and DeLuco, who was only suspended for 1 week by Baydoun for her part in the Rice incident. Baydoun explained the differences by noting that DeLuco had not caused him problems in the past and was a good server; however, he felt some punishment was in order. In my view, this does not wash. Clearly, the record evidence shows that both Kirby and DeLuco were, by their acts, equally culpable, although Kirby possibly had a larger role and kept the lawsuit harangue going a little longer.³⁶

³⁶ I draw this conclusion from Rice, who testified that Kirby was the one who took the leadership role in suggesting that she file a lawsuit and was far more persistent than DeLuco in urging Rice to file a discrimination suit.

Lastly, there is the testimony of Baydoun's decision to discharge Kirby. Baydoun testified that he decided to fire Kirby on May 16, after his conversation with Lamentola, who had just minutes before told him of Kirby's allegations of racial discrimination.

On balance, I would conclude that the Respondent was motivated to discharge her, at least in substantial part, by Kirby's engaging in protected concerted activity. *Reddicar Corp.*, 264 NLRB 997 (1983).

Conclusions

Since I have determined that the General Counsel has established a prima facie case of a violation of the Act, it remains to be determined whether the Respondent has satisfactorily shown that it would have terminated Kirby even in the absence of the protected activity.

Baydoun's credible testimony makes clear that over the time he supervised her, Kirby was a problematic employee who used foul language, had poor interpersonal skills, and could on occasion exhibit a bad work "attitude." In spite of what I consider to be fairly egregious conduct on the job, nonetheless, Baydoun kept Kirby on. His reasons were several, ranging from his sympathy for Kirby's pregnancy and her need for a job, his need to retain trained servers, his general disinclination to fire people, and perhaps, as Rice testified, his being an all around "nice guy" who tried to bring out the best in Kirby. Irrespective of his reasons, Baydoun and the Respondent clearly tolerated Kirby's behavior, perhaps too long. It is also significant to me that when Baydoun told Lamentola to fire Kirby on May 16, he did not mention any of the past problems as a reason to fire Kirby and send her home.³⁷ It is also of some note to me that if one were to separate Kirby's allegation of racial discrimination from her subsequent actions (pestering Rice, etc.), her behavior does not seem nearly as disruptive of the Respondent's business as some of her past actions. It is undisputed that Kirby exercised poor judgment in choosing the wrong time — the luncheon hour — and the wrong place — the serving area — to tell Rice of her suspicions, and perhaps she was not sensitive enough to anticipate the effect her charge would have on Rice, and even the Respondent's customers who overheard the fracas. However, the whole affair lasted only about 30 minutes and, according to Lamentola, fully abated, with everyone completing their shifts without further incident.

It seems to me that given Baydoun's prior light discipline of Kirby for what I consider overall much more serious infractions, were it not for Kirby's discrimination allegations, she would not have been fired for causing the disruption of the Respondent's business on May 16. Perhaps, Baydoun would have escalated her discipline to a suspension because of her involvement in the disturbance (as with DeLuco), but, given his sympathies for her, he probably would not have terminated her.³⁸ I am not persuaded by the Respondent's assertion that the May 16 incident was merely the last of a series of intolerable behavior on Kirby's part, and that it fired her for this reason. On the contrary, while I agree that Kirby's behavior in the affair was less than laudable, her protected concerted activity — raising the specter of racial discrimination — was the trigger event for her discharge, which then became inextricably

³⁷ Lamentola testified credibly that Baydoun did not tell her to fire Kirby because of her past problems. Lamentola expressed her belief that Baydoun was firing Kirby for what had happened on May 16, his saying to her "we don't need that extra nonsense."

³⁸ I note that Baydoun left the door open for Kirby's return to work after she delivered her child.

entangled in all that followed. Thus, I would conclude that the Respondent has not persuaded me that it would have terminated Kirby even in the absence of her protected concerted activity. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

5 For the foregoing reasons, I find that the Respondent violated Section 8(a)(1) of the Act by discharging Kirby. I further find that Kirby did not disqualify herself from the usual remedies of reinstatement and backpay by her post-discharge conduct. The evidence of record indicates that Kirby, on other occasions, had used profanity in the workplace, had been discourteous to a customer, and disrespectful and uncivil to her fellow workers, including a supervisor. Baydoun
10 testified that Kirby had been impolite to the staff on many occasions over the year he supervised her, causing him to counsel her to mind her manners. Baydoun never contemplated firing her, because he evidently thought she was worth retaining in spite of her problems and “attitude.” Thus, while I view Kirby’s post-discharge conduct as beyond the pale,³⁹ on balance it was little different (if at all) from her prior misconduct for which she was never, after several
15 reprimands and counseling, even suspended. Moreover, it could be reasonably argued that Kirby’s intemperate reaction was provoked by the Respondent’s unlawful action against her.

In any event, given the context of her history with the Respondent, Kirby’s post-discharge conduct on May 17 was not so outrageous so as to make her unfit for employment.
20 *Alto-Shaam, Inc.*, 307 NLRB 1466 (1992), *enfd.* 996 F.2d 1219 (7th Cir. 1993), *cert. denied* 510 U.S. 965 (1993); *C-Town*, 281 NLRB 458 (1986).

Conclusions of Law

25 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

30 2. By discharging Kimberly Kirby because she concertedly told other employees that the Respondent engaged in racially discriminatory hiring practices, the Respondent has violated and is violating Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

³⁹ I find that Kirby’s post-discharge conduct was egregious and reprehensible, and certainly not excusable because of her possibly hurt feelings and evident disappointment in Rice’s lack of appreciation of her intentions. Kirby, in my mind, had no right to curse her supervisors and a fellow employee, or to disrupt the business of the Respondent.

The Remedy

Having found that the Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist therefrom and from engaging in like or related unlawful conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily terminated Kimberly Kirby, I recommend that the Respondent be ordered to offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings and benefits that she may have suffered from the time of her discharge to the date of the Respondent's offer of reinstatement. I shall further recommend that the Respondent be ordered to expunge from its records any reference to her unlawful termination, to give her written notice of such expunction, and to inform her that its unlawful conduct will not be used as a basis for future personnel actions against her. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

ORDER

The Respondent, Dearborn Big Boy No. 3, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment, because they engage in protected concerted activity by complaining to their fellow employees, the Company, or to governmental authorities about racially discriminatory hiring practices, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kimberly Kirby full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for losses she suffered by reason of the discrimination against her, as set forth in the remedy section of this Decision."

⁴⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kimberly Kirby, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Detroit, Michigan facility copies of the attached notice marked "Appendix."⁴¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 23, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 3, 1997

Earl E. Shamwell Jr.
Administrative Law Judge

⁴¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees, or in any other manner discriminate against them with regard to their hire or tenure of employment or any term or condition of employment, because they engage in protected concerted activity by complaining to their fellow employees, the Company, or to governmental authorities about racially discriminatory hiring practices, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Kimberly Kirby full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for losses she suffered by reason of the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Kimberly Kirby, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

DEARBORN BIG BOY NO. 3, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.